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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

COMMODITY FUTURES TRADING	)	
COMMISSION,	)	
	)	No.: 04-cv-1512 (RBK)
Plaintiff,	)	
	)	
vs.	)	
	)	
EQUITY FINANCIAL GROUP, LLC,	)	
TECH TRADERS, INC., TECH	)	
TRADERS, LTD., MAGNUM	)	
INVESTMENTS, LTD., MAGNUM	)	Hearing Date: January 20, 2006
CAPITAL INVESTMENTS, LTD.,	)	
VINCENT J. FIRTH, ROBERT W.	)	
SHIMER, COYT E. MURRAY, and J.	)	
VERNON ABERNETHY,	)	
	)	
Defendants.	)	

**BRIEF IN SUPPORT OF EQUITY RECEIVER’S  
MOTION TO COMPEL ROBERT SHIMER TO PRODUCE TAX RETURNS**

Stephen T. Bobo, as Equity Receiver (the “Receiver”) for Defendant Robert W. Shimer (“Mr. Shimer”), moves this Court to compel Mr. Shimer to produce copies of his income tax returns for the years 1999 through 2003. Mr. Shimer, who is under receivership in a *fraud* case involving a multi-million dollar Ponzi scheme and who has derived over a million dollars of income from investor funds over the past 5 years, refuses to produce these returns. The Court should compel their production for the following reasons:

1. This Court's Orders require Mr. Shimer to produce such key financial information;
2. The federal priority statute requires the Receiver to ascertain Mr. Shimer's federal tax liability;
3. Statements made by Mr. Shimer in documents provided to the Receiver and at his deposition and by both Mr. and Mrs. Shimer in submissions to this Court raise questions about the sources and types of his income over the past five years (see, e.g. Att. 2 to the Receiver's affidavit, attached as Ex. A.);
4. Mr. Shimer's banks have not yet provided the Receiver and the CFTC a complete set of relevant bank records (see J. McCormack Declaration, attached as Ex. B, ¶ 3a (Pre-2001 bank records for Mr. Shimer's attorney escrow account unavailable to date));
5. Mr. Shimer's various statements about his current assets and liabilities are irreconcilable; and
6. Mr. Shimer's argument that he is entitled to withhold the joint tax returns he filed with Mrs. Shimer because her finances are irrelevant here is meritless given that he transferred almost \$800,000 of investor funds to a joint account he maintained *with* Mrs. Shimer which he used to pay *joint* expenses<sup>1</sup> and Mrs. Shimer has submitted a claim for a distribution from the receivership estate that she argues should be treated independently of this benefit. (See Att. 1-2 to the Receiver's affidavit, attached as Ex. A.)

As set forth in the Receiver's affidavit, the Receiver's counsel has in good faith conferred with Mr. Shimer in an effort to obtain the requested documents, including offering a confidentiality agreement among the Receiver, Mr. Shimer and the CFTC, but to no avail. (See Att. 7-9 to the Receiver's affidavit, attached as Ex. A.) In further support of his motion, the Receiver states:

**The Receiver's powers and duties under this Court's orders and federal law.** On April 1, 2004, this Court froze Mr. Shimer's assets, directed the Receiver to take control of the frozen assets and authorized him to determine how to distribute them to investors and other creditors. The Court, for example, directed and authorized the Receiver to:

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<sup>1</sup> (See J. McCormack Declaration, attached as Ex. B, ¶¶ 4-8).

Initiate, defend, compromise, adjust, intervene in, dispose of, or become a party to any actions ... necessary to preserve or increase the assets of the Defendants or to carry out his ... duties .... [and] [m]ake payments and disbursements from the receivership estate that are necessary or advisable for carrying out the directions of, or exercising the authority granted by, this Order.

(See Statutory Restraining Order and Order Appointing Receiver at 5.) Like the investor claim process the Receiver has already carried out and the creditor claim process he will initiate for Tech Traders, Inc. and Equity Financial Group, LLC, the Receiver also may deem it appropriate to initiate a claim process for Mr. Shimer's creditors. If Mr. Shimer is found culpable for the conduct the CFTC alleges and obtains a significant monetary judgment against him, he may also be required to make restitution to defrauded investors or pay a share of receivership administration fees and expenses. For these reasons, this Court's orders require Mr. Shimer to provide the Receiver his financial information, such as tax returns.

As discussed more fully below, the Receiver requests returns starting 1999 because that is the year in which Mr. Shimer started soliciting investors and taking in investor funds. He and his colleagues opened bank accounts in the name of Kaivalya Holding Group for these investor funds and, from what the CFTC has learned to date, from 1999 through 2001, he transferred \$228,230 from Kaivalya bank accounts to accounts maintained in his name (see J. McCormack Declaration, attached as Ex. B, ¶ 5a-5e), even while he told Kaivalya investors that they had lost their invested principal. From 2002 through March 2004, Mr. Shimer transferred to Kaivalya over \$1.3 million of funds originating from Tech Traders investors (*id.* ¶ 9) – who knew nothing about, and had no relationship to, Kaivalya – and withdrew additional sums for his and Mrs. Shimer's benefit. (See *id.* ¶¶ 5f-5g.) Mr. Shimer's deposition testimony regarding the reasons for, and characterizations of, these withdrawals from Kaivalya (and analogous withdrawals from Edgar and Equity, two other entities he formed to receive investor funds) is vague and

inconclusive, raising more questions than it answers. Finally, as discussed below, the federal priority statute requires the Receiver to confirm that Mr. Shimer properly reported the income he derived from Kaivalya, Edgar and Equity and is current on federal taxes due on that income.

**The Receiver's duties under the federal priority statute.** The federal priority statute requires the Receiver – as custodian of Mr. Shimer's assets – to treat Mr. Shimer's obligations to the United States government, if any, as a priority claim. In pertinent part, the statute states that “[a] claim of the [United States] Government shall be paid first when ... a person indebted to the Government is insolvent and ... an act of bankruptcy is committed.” 31 U.S.C.

§ 3713(a)(1)(A)(iii). Taxes owed to the United States undoubtedly fall within the scope of a “claim of the United States Government.”<sup>2</sup> And, courts deem commencements of receiverships and written admissions of inability to pay debts “acts of bankruptcy.” United States v. Emory, 314 U.S. 423, 425 (1941). The statute, moreover, exposes the Receiver to potential *personal* liability for a violation. See 31 U.S.C. § 3713(b).<sup>3</sup> This receivership and Mr. Shimer's written admission of his inability to pay his debts are “acts of bankruptcy” that trigger the federal priority statute. The Receiver cannot fulfill his duty under the federal priority statute without reviewing Mr. Shimer's tax returns to determine whether Mr. Shimer owes back federal taxes.

**Mr. Shimer's obligations under this Court's orders.** Mr. Shimer's refusal to provide the Receiver copies of his tax returns violates this Court's orders. As early as April 2004, this Court ordered Shimer to

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<sup>2</sup> See United States v. Coppola, 85 F.3d 1015, 1020 (2d Cir. 1996) (citing Massachusetts v. United States, 333 U.S. 611, 625-26 (1948)).

<sup>3</sup> For liability to attach, the custodian must know of the debt owed to the United States or have notice of facts that would lead a reasonably prudent person to inquire as to the existence of the debt owed. Coppola, 85 F.3d at 1020 (citing In re Gottheiner, 703 F.2d 1136, 1140 (9th Cir. 1983); Want v. Commissioner, 280 F.2d 777, 783 (2d Cir. 1960); Huddleston v. Commissioner, 67 Tax Ct. Mem. Dec. (CCH) 2521, 2524, 1994 WL 100520 (1994)).

[D]eliver over to the Receiver ... [p]ossession and custody of documents ... including but not limited to, all books and records of accounts, all financial and accounting records, balance sheets, income statements, bank records (including monthly statements, canceled checks, records of wire transfers, and check registers), client lists, title documents, and other papers.

(See Statutory Restraining Order at 5-6.) The Court further ordered Shimer to “cooperate fully with and assist the Receiver in the performance of his duties,” including, but not limited to, “providing any information to the Receiver that the Receiver deems necessary to exercising the authority and discharging the responsibilities of the Receiver under this order.” (Id. at 6.)

The Consent Order of Preliminary Injunction Against Mr. Shimer entered on June 24, 2004 restrains him from directly or indirectly dissipating, concealing or disposing his cash or other assets, including, but not limited to, “all funds, personal property, money or securities ... and all funds on deposit in any financial institution, bank or savings and loan account,” whether held in his name or not. This includes assets acquired after June 24, 2004. (See Consent Order of Preliminary Injunction, at 5-6.) The Order also requires Mr. Shimer to “cooperate fully in providing information to the Receiver” on “the source, amount, disposition, and current location of all funds, securities, commodity interests, assets and other property transferred or otherwise disposed of directly or indirectly by [him].” (Id. at 7.)

Although he has provided the Receiver his 2004 income tax return,<sup>4</sup> the Receiver still needs Mr. Shimer’s 1999 through 2003 tax returns in order to fully understand Mr. Shimer’s financial condition. The Receiver, for example, expects the returns to show whether Mr. Shimer reported all the income he derived from Kaivalya, Edgar and Equity from 1999 and 2004, how he characterized that income, and whether he paid all taxes due on that income. He also needs the returns to confirm that Mr. Shimer has not dissipated, concealed or disposed his cash or other

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<sup>4</sup> This return also raises issues, but the Receiver neither addresses those issues nor attaches a copy of the return to this motion out of respect for the Shimers’ privacy.

assets, in violation of the Consent Order of Preliminary Injunction entered against him on June 24, 2004. Finally, the returns should corroborate Mr. Shimer's statement of assets and liabilities, other key financial information, such as other sources of income, names of banks, brokerage firms and other financial institutions with whom Mr. Shimer did business over the past five years, the amount of equity he has in now-frozen real estate and amounts of tax refunds he received, if any.

**Examples of contradictions or unanswered questions in the information provided.**

**1. Statement of Current Assets**

In a letter dated October 7, 2005, Mr. Shimer purportedly provided the Receiver an exhaustive list of his current assets and liabilities.<sup>5</sup> This list shows assets worth approximately \$565,000 and liabilities worth approximately \$1.2 million, effectively establishing Mr. Shimer's insolvency. (See Att. 6 to the Receiver's affidavit, attached as Ex. A.) This picture of Mr. Shimer's current net worth defies credibility in light of his admitted ownership of three homes, plus a time-share interest in a mid-town Manhattan condominium valued at between \$11,000 and \$15,000 and a sailboat valued at between \$11,000 and \$15,000, his admission of current average monthly expenses of \$12,400 and the fact that he drew almost \$1 million from Kaivalya, Edgar and Equity from 1999 through March 2004 for his and his wife's personal benefit. (See J. McCormack Declaration, attached as Ex. B, ¶¶ 5-8). The Shimers, in fact, derived greater personal benefit from the Tech Traders Ponzi scheme than any other individual.

Mr. Shimer's purported insolvency is also belied by the statement of net worth Mr. Shimer provided in an investor questionnaire as trustee for his deceased father's trust. In that questionnaire, Mr. Shimer stated that he, as one of the trust's two beneficiaries, was an

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<sup>5</sup> He later told the Receiver's counsel that he had inadvertently omitted from his list of assets a time-share interest in a Manhattan condominium and a sail boat. (See Att. 7 to Receiver's affidavit, attached as Ex. A.)

accredited investor with a net worth exceeding \$1 million. (See Att. 2 to J. McCormack Declaration, attached as Ex. B.) Likewise, in her investor questionnaire, Mrs. Shimer stated that her net worth or joint net worth with spouse exceeded \$1 million. (See Att. 1 to J. McCormack Declaration, attached as Ex. B.) Reviewing the Shimers' tax returns is likely to help clarify Mr. Shimer's financial condition.

## **2. Income from Kaivalya**

Because neither the CFTC nor the Receiver has to date received account statements for 1999 and 2000 for Mr. Shimer's attorney escrow account at Patriot Bank, there are several unanswered questions about how much income he drew from Kaivalya in those years. (See J. McCormack Declaration, attached as Ex. B, ¶ 3a.) What is known, however, is that from 1999 through 2001, Mr. Shimer transferred a total of \$116,265 of investor funds from Kaivalya to his personal accounts (id. ¶¶ 5a, 5c, 5d.) and the Shimers withdrew \$111,965 to their joint account. (Id. ¶¶ 5b, 5e.) Between 2002 and April 2004, *after* he told Kaivalya investors that their principal was lost, Mr. Shimer transferred over \$1.3 million of funds originating from Tech Traders' investors into Kaivalya bank accounts. (Id. ¶ 9.) Apparently without regard or respect for Kaivalya's separate corporate existence, Mr. Shimer then treated these funds as his own and disbursed them at his sole discretion. For example, he made a gift of \$50,000 of these funds to David Perkins. (Id. ¶ 10.) From 2002 through March 2004, Mr. Shimer also transferred a total of \$27,000 of these funds to his attorney escrow account and \$186,700 to his joint account. (Id. ¶¶ 5f-5g.) The Receiver is obliged to ensure that Mr. Shimer declared this income, paid appropriate taxes on it, and is not concealing funds. This is not possible without access to his tax returns.

### **3. Income from Edgar**

In 2001, Shimer claims to have loaned \$150,000 to Edgar. (Dep. of R. Shimer at 449, attached as Ex. C.) In 2001 themselves, however, he transferred \$180,350 from Edgar's account to his joint account, netting \$30,350 in reportable income for himself and his wife. (See J. McCormack Declaration, attached as Ex. B, ¶ 7a.) From 2002 through March 2004, Mr. Shimer netted another \$36,450 in reportable income from Edgar. (Id. ¶ 7b.) Again, the Receiver is obliged to ensure that this income was reported and that Mr. Shimer paid taxes on this income and is not concealing funds.

### **4. Income from Equity**

From 2002 through March 2004, Mr. Shimer transferred \$260,367 of investor funds from Equity to his joint account<sup>6</sup> and \$6,100 to his attorney escrow account. (See J. McCormack Declaration, attached as Ex. B, ¶ 8.) The federal priority statute requires the Receiver to ensure that he reported and paid taxes on this income and is not concealing funds.

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<sup>6</sup> This figure does not take into account the \$150,000 that Mrs. Shimer invested with Tech Traders, Inc. through Shasta Capital Associates on or about September 5, 2003 because Mrs. Shimer herself acknowledges in her claim form that she took no distributions from her account with Shasta. (See Att. 1 to Receiver's affidavit, attached as Ex. A.)

